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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 393

GERALD G. BARRY and GEORGIANA G. BARRY,
Petitioners,

vs.

CHRYSLER CORPORATION, CHRYSLER SALES CORPORATION, CHRYSLER MOTOR PARTS CORPORATION, CHRYSLER ILLINOIS COMPANY, and DODGE BROTHERS CORPORATION (original defendants), and BUDD WHEEL COMPANY (Intervenor defendant),
Respondents.

MOTION BY PETITIONERS TO VACATE AND SET ASIDE ORDER OF OCTOBER 26, 1942, WHICH DENIED THEIR APPLICATION FOR WRIT OF CERTIORARI, AND, THEREUPON, TO RECONSIDER AND GRANT THE PETITION OR, IN THE ALTERNATIVE, OTHER RELIEF; AND GROUNDS IN SUPPORT OF THIS MOTION

PATRICK J. LUCEY,
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Attorneys for Petitioners.

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And now come said Gerald G. Barry and Georgiana G. Barry, petitioners in the above entitled cause, and respectfully move the Court to vacate and set aside the order entered herein October 26, 1942, which denied said petitioners' application for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and petitioners humbly pray this Honorable Court for a reconsideration of the order, and, thereupon,

grant the prayer of the petition, or, in the alternative, that this Honorable Court enter an order, reversing the judgment of said Court of Appeals, and remanding to said Court with directions to proceed in accordance with the grounds presented by petitioners.

And as grounds in support of this motion petitioners respectfully show:

I.

As the said Circuit Court of Appeals filed no opinion, other than a one-paragraph *per curiam* opinion, is such a review by said Appellate Court within the guarantee of the due process clause of the Fifth Amendment to the Constitution of the United States, in view of the peculiar nature of this record, wherein was presented the unusual picture of a per curiam decision which did not consider or judicially determine a single one of the Points of Error, or questions presented upon the actual record of the instant case on appeal?

The *per curiam* decision of said Court of Appeals rests solely upon a superficial reference to the opinion and the adoption of an erroneous opinion upon unrelated issues, rendered in an earlier case of plaintiffs against different defendants, upon a decidedly different record. The instant record includes some distinctly different accused devices, *which were not involved or before the courts* in the earlier *Studebaker* case; and the record of the instant case on appeal is not only devoid of any testimony for defendants, or any relevant, material evidence to the contrary of the very clear and sufficient proofs of validity and infringement established by the plaintiffs, or of any showing of facts or law to overcome the effect of the well settled rule of presumption of validity of the said claims 6, 7 and 9, in suit, which attach and result from the *grant* of the said claims by the govern-

ment *after* due proceedings in and *adjudication* by the Patent Office, but, moreover, **the instant record does not contain any of a great mass of wholly incompetent testimony and "evidence," numerous models, charts, elaborate colored drawings, etc. which was present, but never should have been admitted in the earlier case, and upon which the Studebaker opinion was predicated.** *That same "evidence," or the record of the earlier Studebaker case, was not presented before either the District Court or the Court of appeals, nor considered in any way in connection with the Points of Error or questions presented,* either in the record, briefs or argument, before the said Circuit Court of Appeals *in the instant Chrysler* case. In the *Chrysler* case the attempted defense was a complete failure. **Defendants relied solely on the naked pleading of "applicability of the rule of stare decisis"** by reason of the erroneous opinion in the earlier *Studebaker* case; and the *per curiam* opinion of the Court of Appeals rests on approval of that "plea," without any evidence in the record or supporting authority.

Manifestly, petitioners were denied the equal benefit and protection of the laws, and deprived of the valid patented property rights, measured and defined by the government grant of the claims in issue, without due process of law guaranteed by the Constitution. The decisions are in conflict with numerous applicable decisions of this Honorable Court; and the decisions have not been and cannot be sustained by reference to any authority.

II.

Does not this record present a peculiar and erroneous application of the rule of *stare decisis* by reason of defendants' *pleading* (without any evidence or authority in support of their *pleading*), the opinion in an earlier

case between different parties, involving different subject matter, and a manifestly different record? Does not this situation present a basis or ground within the category of grounds for allowance of petitioners' application for certiorari herein?

III.

As a rule of guidance in future cases, would not an expression of opinion by this Honorable Court, clearly defining the instances wherein a Federal court in a patent infringement case, in arriving at a decision therein, may consider *records* in unrelated cases, between different parties, and different subject matter, and the opinion of this Court serve as a guide in future controversies, in view of the uncertainty of the *per curiam* opinion on this point, as disclosed in the petition for certiorari on file herein?

IV.

It is most respectfully urged that the denial of the petition for certiorari deprived the petitioners of the benefit of the rule of law handed down by this Honorable Court in the case of *Triplatt, et al.* v. *Lowell, et al.*, 297 U. S. 638, and creates a conflict with the doctrine laid down in that case, wherein it was held that an adjudication adverse to any and all of the claims of a patent in an earlier suit "is not *res judicata* and may not be pleaded as a defense" in a later suit, on the same claims, against a different defendant; that "relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant" *is not precluded* (p. 644), and that the court having jurisdiction of a later suit "must determine for itself validity and ownership of the claims asserted, notwithstanding a prior adjudication of invalidity of some of them, unless those issues have become *res adjudicata* by reason of the fact

that both suits are between the same parties or their privies." Petitioners further respectfully submit that it is regarded as fundamental to the exercise of the reviewing power of any appellate court that it is authorized and commanded to look only to the actual record before it in the instant case on appeal, and that it must judicially determine the Points and questions presented *upon that record alone.* The unusual *per curiam* opinion in the instant *Chrysler* case does not consider or decide a single one of the Points or questions presented, referable to any of the findings or evidence of record in the instant case, but the per curiam decision is erroneously based on different grounds, not found in any of the points in this record, nor sustained by any evidence, or supported by any authority.

V.

Would it not serve as a rule of guidance in future cases if this Honorable Court were to clarify the law so that litigants would know whether the *Triplatt* case was still the rule of decision of this Honorable Court or has been impliedly superseded?

VI.

As a rule of guidance in future cases petitioners most respectfully submit that the instant record presents a situation which, in their humble opinion, merits expression of opinion by this Honorable Court, defining and settling as a rule of practice and procedure what is the purpose and effect of "findings of fact" and of "conclusions of law," submitted in a patent infringement case, pursuant to Rule 52 of the Federal Rules of Civil Procedure, following the statutory provisions, and in view of decisions of this Court, such as *Eastman Kodak Co.* v. *Gray,* 292 U. S. 332. It is most respectfully urged that the denial of the petition for certiorari, in view of the

points and presentation of the question upon this record, creates a conflict with the wise purpose of the rules and the doctrine of the law laid down in applicable decisions of this Honorable Court.

VII.

In view of the exceptional nature of the *per curiam* opinion it was deemed necessary for the petitioners to support the jurisdictional grounds by reference to the *essential* facts as we have in the petition, in order to comply with the rulings of this Court that a petition for certiorari should make a *clear, definite* and *complete disclosure concerning the controversy,* since it is impossible for the court critically to examine the record before ruling on the application. (*Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508.)

Petitioners humbly pray that this Honorable Court reconsider the record and petition for certiorari herein, vacate and set aside the order which denied the application, and upon reconsideration of said petition grant certiorari.

In the alternative, petitioners pray that the order denying the petition for certiorari be vacated and set aside, and that an order be entered by this Honorable Court, reversing the judgment of said United States Circuit Court of Appeals for the Seventh Circuit, with directions to said court to proceed in accordance with the grounds presented by petitioners.

Most respectfully submitted,

PATRICK J. LUCEY, and
GERALD G. BARRY,
Attorneys for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Patrick J. Lucey and Gerald G. Barry, each being duly sworn according to law, on oath, respectively say:

The foregoing motion by petitioners to vacate and set aside the order of October 26, 1942, which denied the petition for certiorari herein, and to reconsider and thereupon grant the petition for certiorari, or alternative relief, and the grounds stated in support of petitioners' motion, are presented in good faith and not for delay; and we verily believe the case is one in which the said motion and prayer of the petitioners should be granted by this Honorable Court.

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Subscribed and sworn to
before me this.....day of
November, 1942.

.....
Notary Public.